APPENDIX I.

Opinion of the District Court.

Wilkerson, *District Judge.* Plaintiff is the lessee under leases covering the ground upon which the Chicago Auditorium Building is erected. The leases cover five separate parcels of land and were executed in 1887. In two of the leases Wirt D. Walker was the lessor, and Mark Skinner Willing, as trustee, and other defendants, as set forth in the pleadings, have succeeded to his interest. In another of the leases Walter G. Peck, Clarence I. Peck, and Ferd W. Peck were the lessors, and William A. Slater, as trustee, and other defendants, as set forth in the pleadings, have succeeded to this interest. In two of the leases Studebaker Bros. Manufacturing Company was the lessor, and Emily C. Chapin and other defendants, as set forth in the bill, succeeded to this interest.

In essential respects the provisions of the leases are the same. They are for the period of 99 years. The lessee agrees to forthwith begin and to build on the premises a substantial and solid fireproof building of brick, stone, iron, steel, and tile, and such other materials as are necessary and usual in fireproof buildings in the city of Chicago, the same to be in all respects in accordance with the building ordinances of the city of Chicago, and to carry on and prosecute the erection of the building with all reasonable dispatch, and to have the same completed before August 1, 1889; the building in the character of the materials to be used in its construction, to be as follows:

"All columns shall be of iron, stone, or brick, and all iron and steel columns and girders shall be fireproofed with a covering of porous terra cotta or hollow tile, or like material; all beams, joists, and roofing beams and joists shall be of iron or steel; all constructional floors shall be arches of hollow tile or like materials; all partitions shall be of brick or hollow tile; the roof shall be iron, brick, or hollow tile; the stage of the auditorium in said building, however, may be built of such material and in such manner as may seem most expedient to party of the second part."

In one of the Walker leases it is provided that the building to be built on the premises shall cost not less than $475,000; in the other it is provided that the building shall cost not less than $275,000. In the Peck lease it is provided that the building on the premises shall cost not less than $400,000. In the Studebaker leases it is provided that the building to be erected on each parcel shall cost not less than $50,000. The leases provide for fixed rentals until August 1, 1906, after which date the rent is to be 6 per cent. upon the value of the premises, exclusive of improvements; such valuations to be made on August 1, 1906, and every 10 years thereafter, in the manner provided in the leases.

The leases contain the usual covenants for payment of water rates, taxes, and assessments, against assignment without consent of the lessor, for the payment of rent, and for the termination of the lease in case of default of the lessee in complying with the covenants of the lease. Each of the leases contains the following provision:

"And the said party of the second part further covenants and agrees that it will at all times during the term hereby demised, at its own proper cost and charges, keep the building situated upon said demised premises, and all appurtenances belonging thereto, in good repair, and in a safe and secure condition, and that it will keep all rooms in said building in a good, safe, clean, and tenantable condition and repair during the entire term of this lease."

The leases contain provisions for the insurance of the premises and with reference to the collection and use of the insurance in case of loss. It is provided:

"If said buildings, or any part thereof, shall at any time or times during the continuance of the term hereby granted, be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before the said fire happened, or such other plans as by the party of the first part shall be approved in writing, and have the same rebuilt and ready for occupancy within two years from such loss or destruction; and that as often as said buildings or improvements shall be burnt down or damaged by fire, all and every sum or sums of money which shall be recovered or received by the party of the second part for or in re-

spect of said insurance, shall be laid out by it in rebuilding or repairing said building."

The leases also provide:

"That in the event of the determination of this lease at any time before the expiration of the term of 99 years hereby demised, for the breach of any of the covenants herein contained, then and in such case all buildings, fixtures and improvements, then situate upon said demised premises, shall belong to and be the property of said lessor, and no compensation therefor shall be allowed or paid to said lessee."

The leases provide for appraisal at the expiration of the term of the "actual cash value of any and all building or buildings, and any and all improvements that are then situate and standing upon said premises," and for securing to the lessee reimbursement for such value. It is provided:

"In making said appraisement of the value of said improvements, the appraisers or court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said improvements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have, if vacant."

Upon the execution of the five leases, the lessee, with the knowledge and consent of the lessors, erected the Auditorium Building upon the five parcels of ground covered by the leases. The building is a single structure, and is not separable into parts apportionable to the separate leaseholds. The building was completed about December 1, 1889. In 1891 the Walker and Peck leases were modified. The term in each case was extended for an additional period of 100 years, so that the leases expire on August 1, 2085. The provisions for revaluation were eliminated and a fixed rental provided for the entire term of the leases. It was provided that all the covenants, agreements, conditions, and provisions of the original leases, except as modified by the agreement of 1891, should continue in full force and effect.

The facts, averred in the pleadings and established by the evidence, upon which plaintiff bases its claim for relief in equity, are as follows:

The Auditorium Building was erected before the development of modern steel construction. It is only 10 stories in height. Many more stories are required to produce an adequate return upon the ground value in central districts of cities like New York or Chicago. The Auditorium represents an obsolete type of construction. It has walls of brick and stone resting upon floating foundations. The foundation for a modern steel construction building of the best type should consist of caissons extending down to bed rock. The exterior walls of the Auditorium are what are commonly known as bearing walls, which are constructed of masonry throughout; whereas, the exterior walls of a modern fireproof building of the highest type are known as screen walls, and are supported upon the construction of the various floors, which are in turn supported by steel columns carrying the weight of the entire building. The columns used in the construction of the Auditorium are of cast iron, having lugs with which to support the beams and girders of the floor systems, which are bolted thereto; whereas, the columns in a modern fireproof building of the highest type are built up of structural steel members, which are riveted together and proportioned to carry the load thrown upon them. The beams and girders of the Auditorium have only bolted connections with the columns; whereas, in modern fireproof construction of the highest type, all joints are made with splice plates, lugs, and angles, with riveted connections for rigid fastening and accurate predetermination of the strength and construction.

The engineering formulas now employed in the construction of a modern fireproof building of the highest type state the limitations of the steel stresses and of the strength of materials used, but such formulas were not complied with in the construction of the Auditorium Building, for the reason that they had not been determined. Owing to the lack of experience and lack of precedents, the methods of design and construction actually employed in the erection of the Auditorium, while the best and most advanced known at the date of its construction, were inadequate and improper from a modern point of view.

Since the construction of the Auditorium, the value of the land upon which it is built has increased greatly. The character of the property in its neighborhood has

changed completely. The west side of Michigan avenue is in great demand for large and expensive buildings for hotels, offices, and stores. Upon a 6 per cent. basis, the rents fixed in the leases represent a valuation of $637,500. The present value of the fee of the property in question (exclusive of the building) is more than $3,500,000. The present value of plaintiff's leasehold interest, estimated upon a 5 per cent. basis, is more than $2,000,000. The net excess of the aggregate computed annual rental values on the basis of the above percentage and valuations over the actual rents now payable under the leases is more than $100,000. The rental value of the Auditorium property, unincumbered and unimproved, taken as a unit for building purposes, is substantially greater than the aggregate rental value of the properties taken separately.

There has been a progressive increase of the burden of taxes payable by the lessee. In 1890, the taxes were $22,707.78; in 1923, they were $145,289.23. The operation of the building has not been profitable. Plaintiff has with difficulty been able to pay the ground rent due under the leases, the taxes, interest on bonded indebtednesses, and other expenses of operation, and to retire a small amount of its bonds. If the actual depreciation of the building at the present time is taken into consideration, substantially the only value left with which to liquidate the principal of the bonded indebtedness of $1,375,000, or to return to the stockholders any part of the investment represented by its capital stock, is the value of its leasehold interests, as represented by the difference between the present annual rental value of the fee, unimproved and unincumbered, and the ground rentals accruing from the leasehold interests to the owners of the fee of the property.

In order to secure adequate returns upon the value of the leasehold interests, the present building must be torn down and a new one erected. Such returns can be realized only from a building of greatly increased height, which will provide the maximum obtainable number of floors, with the maximum amount of floor space, and such a building would require a modern steel skeleton structure, supported on caisson foundations, and carried to the maximum height now allowed by law. The present building is now 35 years old and is obsolete in its construction. Its general construction consists of heavy in-

closing walls of masonry, with a skeleton interior construction of cast iron columns and steel or wrought iron trusses. There has occurred a large amount of settlement in the structure, amounting in some places to 22 inches; the maximum of settlement has occurred under the heavy masonry walls, while the skeleton interior construction has, by comparison, settled to a much less extent, and these local differences in settlement have created a distortion in the interior skeleton construction, which has resulted in the fracturing of some of the struts and connections in the framework of the interior construction, and in the cracking of masonry, plaster, and other finished surfaces. By reason of the fact that most of the metal used in the interior construction is iron, further fractures are likely to occur.

Because of fundamental defects in the construction of the building, it will continue to deteriorate, and there is reasonable ground to believe that it will become unsafe. It is impossible for engineers to make a definite forecast as to how many years will elapse before that stage is reached. When that stage of deterioration shall have been reached, it will not be possible to make the building safe and conformable to the municipal regulations, except at a cost so great that the earnings from the building as reconstructed would not represent an adequate return upon the investment. By reason of the fact that the masonry bearing walls require large pier areas to support the loads of their own weight and the loads from the floor construction thrown upon them, the window areas do not afford adequate light for hotel and office purposes; the finishing is old-fashioned and out of date; the elevators are inefficient and inadequate; the plumbing, drainage, and water supply systems are inadequate, antiquated, and unsound; the heating and wiring systems are inefficient. In short, the building has passed into the class of old buildings, which are being torn down in the central district of Chicago to make place for structures of the size and kind necessary to earn a fair return upon the value of the land on which they are erected. The highest and best use of the property covered by the leases in suit, at the present time and for many years to come, is one involving the construction of a new building of greatly increased height and capacity. Any building adequate to meet these requirements would necessarily be a modern steel-skeleton structure, carried to

the maximum height now permitted by law and supported on caisson foundations. The cost of such a building would be between $10,000,000 and $15,000,000.

Plaintiff desires and proposes to remove from the Auditorium property the present building, and to erect in its place an adequate, modern steel-construction building at a cost of not less than $10,000,000, adapted for a hotel, auditorium, and safety deposit vaults. Plaintiff has under consideration plans for such a building, and has assurances from financial institutions that, if its right under its leases to remove the old building and erect the new one can be established, the necessary funds can be procured. The purpose of this suit is to establish plaintiff's right, under the covenants and conditions of the leases above described, to tear down and remove the present improvement, as a part of and incidental to the erection of a new improvement of equal or greater value, not impairing in any way the security and property right of the lessors, upon furnishing proper and adequate security during the removal of the present improvement and until the completion of the new improvement.

The averment of the bill upon which the jurisdiction of a court of equity is invoked to construe the leases is as follows:

"Defendants * * * claim and assert, and by reason of such claim and assertion certain persons with whom your orator is obliged to deal in the financing of its aforesaid plans are fearful, that the present building cannot be removed without a violation of the terms, covenants, and conditions of said leases, even though such removal be incidental to and a part of the erection of a new and better building upon the same property, and even though adequate security be offered and given to protect the lessors from any loss of value to the property which may occur while the old improvement is being wrecked and removed, and before the new improvement is completed; and such defendants claim, and said persons with whom your orator has to deal are fearful, that, under the terms, covenants, and conditions of the leases, if a destruction of the present improvement occurs or is attempted, even though that destruction be incidental to and a part of the act of erecting a new and better improvement on the same property after adequate security as aforesaid shall have been given, it will constitute waste and a ground of forfeiture of the leases.

The aforesaid claims, fears, and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants, and conditions of the leases of said property, have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising its rights with respect to said leasehold interests, so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants, and conditions of said leases, in so far as they give color to said claims, fears, and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law. Your orator well hoped that the defendants owning or interested in the fee of said Auditorium property would consent to the replacement of the present building by a new and more valuable improvement so as aforesaid contemplated, which would be manifestly beneficial to all parties interested in said leases; but said defendants, or some of them, have refused to give such consent, or to forego the claims constituting as aforesaid a cloud upon your orator's title, unless your orator would pay them large sums of money, in addition to that which is payable to them by the terms of said leases."

The proof shows that plaintiff undertook to negotiate in a general way with some of the defendants concerning the removal of the old building and the erection of a new one. No definite plans were submitted; no specific demand was made. There was a discussion of the terms of the leases, and defendants and their attorneys asserted that the removal of the old building would be waste, and would be a ground of forfeiture. No concrete act of plaintiff was proposed, and no definite threat of forfeiture was made by defendants.

The answer of Mark Skinner Willing, trustee, *et al.*, states:

"These defendants admit that they claim and assert that the present building cannot be removed without a violation of the terms, covenants, and conditions of the leases, if they be valid as leases, even though such removal may be incidental to and a part of the erection of a new and better building upon the same property, and even though alleged adequate security be offered and given to protect the defendants from any loss of value to the property which may occur while the old improve-

ment is being wrecked, and before the new improvement is completed."

In the answer of William A. Slater *et al.* it is stated:

"These defendants aver that, if plaintiff destroys the present improvement, whether for the purpose of erecting a new one or otherwise, such destruction will constitute waste, and will give the owners of the land described in said Peck lease, according to the terms thereof, the right to reenter and repossess themselves of such land, free of any and all claims or rights of plaintiff."

The specific relief to which plaintiff claims it is entitled is stated as follows:

"That this court will remove from the several leasehold interests of your orator the above-mentioned claims and clouds, based upon the alleged force and effect of the terms, covenants, and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties, with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises, upon giving proper security as the court may direct, all as a part of the act of erecting upon said premises a new, suitable, and more valuable building and improvement, and one not in any way impairing the security of the lessor in said several leases, or of their assigns and successors; * * * that the court will likewise, upon your orator giving such security as the court may direct for the protection of the defendants herein, enjoin and restrain the defendants' interest in the fee of said properties, as owners or otherwise, from declaring or attempting to declare any forfeiture of any leasehold interest owned or held by your orator, in which said defendants or any of them are interested as aforesaid, on account of any removal or destruction of the building or improvements upon the land subject to said leases; that said defendants may also be enjoined from taking any steps to prevent your orator from tearing down or removing the present building or improvement located upon any leasehold interest now vested in your orator, in which the defendants or any of them are lessors, or the assigns or successors of or interested under the original lessors. * * *"

Referring to the provision in the leases which obligates the lessors to purchase the building at the end of the term, plaintiff, in its bill, makes the following offer:

"In order to remove such question, if any, as may properly arise about the liability of the owners of the fee to purchase and pay for larger or more expensive buildings and improvements than are now upon said properties, your orator is willing and hereby offers, in case of the replacement by your orator of the present building by larger or more costly improvements, to abide by any conditions which to the court shall seem equitable with respect to such provisions, and to waive, if and so far as such waiver shall be deemed by the court necessary or proper, its right and claim under the above-mentioned provisions of said leases to payment at the termination thereof for the said improvements; and your orator hereby consents that any provision to that effect deemed by the court to be conformable to equity and good conscience may be incorporated in any decree entered by the court in this cause."

Plaintiff urges that it has presented a case which entitles it in equity to have its leases construed by the court in accordance with its interpretation of their provisions and to have that construction enforced by the court's injunction.

It is, of course, elementary, that the court is without power to construe these leases, unless there is presented a case in which are involved rights of persons or property which are actually controverted in the particular case before the court. The judicial power may not be invoked upon a prophecy as to future conditions to establish a rule for controlling predicted future conduct. The plaintiff must ask that the defendant be decreed to do something, and, in a court of equity, the appeal must be predicated upon some ground which requires the exercise of the equitable powers of the court. However desirable it might be to have a decision upon the questions relating to the construction of the leases, this court is not empowered to decide abstract propositions, or to declare, for the government of the future conduct of the parties, principles or rules of law which cannot be made effective by the decree of the court upon the issues which are before it. *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, 116, 40 S. Ct. 448, 64 L. Ed. 808; *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466, 475, 36 S. Ct. 212, 60 L. Ed. 387; *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 314, 13 S. Ct. 876, 37 L. Ed. 747; *Prather* v. *Lewis*, 287 Ill. 304, 122

N. E. 470; *Surry Lumber Co.* v. *Wellons,* 129 Va. 536, 106 S. E. 382; *Southern Ry. Co.* v. *Georgia,* 116 Ga. 276, 42 S. E. 508.

There is no modification of the rule just stated in *Pierce* v. *Society of Sisters of Holy Name,* 45 S. Ct. 571, 69 L. Ed. —— (decided June 1, 1925). An act of Oregon (Laws 1923, p. 9), effective September 1, 1926, required parents and guardians to send children between 8 and 16 years of age to the public schools. The Governor and other officers were required to enforce this law. Such enforcement meant the destruction of the private schools, whose owners sought protection against it. The court said:

"But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. * * *"

Has the plaintiff made out a case for relief under the power of a court of equity to quiet titles and to remove clouds upon titles? The remedies afforded and modes of proceeding pursued in the federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting. Broadly speaking, this equitable jurisdiction is that which was exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the passage of the original Judiciary Act (1 Stat. 73), unless subsequently changed by act of Congress. *Guffey* v. *Smith,* 237 U. S. 101, 114, 35 S. Ct. 526, 59 L. Ed. 856; *Mississippi Mills* v. *Cohn,* 150 U. S. 202, 204, 14 S. Ct. 75, 37 L. Ed. 1052; *McConihay* v. *Wright,* 121 U. S. 201, 205, 7 S. Ct. 940, 30 L. Ed. 932. While the equitable jurisdiction of the federal courts may not be abridged by local law, a federal court of equity may administer an enlargement of equitable rights and enforce and protect rights given by a state statute, when such rights are properly the subject of an equity suit, unless to do so would contravene the distinction between law and equity. *L. & N. R. Co.* v. *Western Union Tel. Co.,* 234 U. S. 369, 376, 34 S. Ct. 810, 58 L. Ed. 1356; *Lawson* v. *U. S. Mining Co.,* 207 U. S. 1, 28 S. Ct. 15, 52 L. Ed. 65; *Devine* v. *Los Angeles,* 202 U. S. 313, 333, 26

S. Ct. 652, 50 L. Ed. 1046; *Greely* v. *Lowe,* 155 U. S. 58, 75, 15 S. Ct. 24, 39 L. Ed. 69; *Holland* v. *Challen,* 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52.

Let us examine the case of the plaintiff in the light of the general usages of equity concerning bills of peace and bills *quia timet,* which control here in the absence of an enlargement of right by the local law. Under the usages of equity, bills of peace are of two kinds:

First. Those which are brought to establish a right claimed by the plaintiff, but controverted by numerous parties having distinct interests originating in a common source. A right of fishery, asserted by one party and controverted by numerous riparian proprietors on the river, is an instance given by Story where such a bill will lie. In such cases a court of equity will interfere, and bring all the claimants before it in one proceeding, to avoid a multiplicity of suits. A separate action at law, with a single claimant, would determine nothing beyond the respective rights of the parties as against each other, and such a contest with each litigant might lead to interminable litigation. To put at rest the controversy, and determine the extent of the rights of the claimants in a common subject, the bill lies, which is thus essentially one for peace. *Sharon* v. *Tucker,* 144 U. S. 533, 542, 12 S. Ct. 720, 36 L. Ed. 532.

Second. Bills of peace of the other kind lie where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same character, and are brought to put an end to the controversy. The equity in such a case arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action was founded upon a fictitious demise, between fictitious parties, and a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be embarrassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation, and give repose to the successful party, courts of equity interfered and closed the controversy.

To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must

have been in the possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It is only where bills of peace of this kind—more commonly designated as bills to remove a cloud on title and quiet the possession to real property—are brought that proof of actual possession is necessary to maintain the suit. *Frost* v. *Spitley,* 121 U. S. 552, 7 S. Ct. 1129, 30 L. Ed. 1010; *Holland* v. *Challen, supra.* In most of the states there has been an enlargement of right in such cases resulting from the abolishment of the fictions of the common-law action of ejectment, and the necessity of repeated adjudications at law upon the right of the plaintiff no longer exists, where this new form of action has been adopted. *Holland* v. *Challen, supra.*

It is clear that plaintiff's case, as stated in the bill or made out at the trial, does not fall within either class of bills of peace. It is not a bill of peace of the first class, because the interests of the defendants do not originate in a common source. The alleged controversies arise out of the provisions of five separate and distinct contracts. But, if the bill is treated as one to determine the rights of the claimants of distinct interests in a common subject originating in a common source, the jurisdiction of this court fails. The case was brought here by removal from the state court, on the ground that the alleged controversy between plaintiff and the defendants who removed the case was a separable one. If the case falls within the first class of bills of peace, it has no place here, and should be remanded to the state court. The basis of such a bill is the avoidance of a multiplicity of suits, and, if the case of one defendant is separated from that of the others, the right of plaintiff to appeal for equitable relief is destroyed.

Nor has the plaintiff presented a case for relief under the rules governing bills of peace of the second class. The title of plaintiff is not assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind.

A bill *quia timet,* or to remove a cloud upon the title of real estate, differed from a bill of peace, in that

it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future controversy by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights or interests. To maintain a suit of this character it was generally necessary that the plaintiff should be in the possession of the property, except where the defendants were numerous, and that his title should have been established at law or be founded on undisputed evidence or long continued possession. *Holland* v. *Challen, supra; Lawson* v. *United States, supra.*

Under the general usages of equity, the fact that the interest of the plaintiff is a leasehold estate is not a bar to the maintenance of a bill to remove a cloud upon title, if the suit is in other respects well founded. A lease for a term of years is a chattel real. It conveys an interest in land. While it has some of the attributes of personalty, it is treated in many respects as real estate. *People* v. *Shedd,* 241 Ill. 155, 89 N. E. 332. Bills may be maintained in this court under the general principles of equity jurisdiction to remove clouds upon the title to real or personal property. Judicial Code, § 57 (Comp. St. § 1039); *Jellenik* v. *Huron Copper Co.,* 177 U. S. 1, 20 S. Ct. 559, 44 L. Ed. 647. But such a bill must meet the test of the usages of equity as to what constitutes a cloud upon title, unless some enlargement of equitable rights is found in the local law.

Under the usages of courts of equity adopted by the Constitution and the Judiciary Acts, clouds upon title had a well settled and defined meaning and signification. In *Phelps* v. *Harris,* 101 U. S. 370, 374 (25 L. Ed. 855) the court said:

"The questions, what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent amongst these are, first, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controvert-

ing it. * * * As to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law."

It is also the rule, under usages of courts of equity which control here, if there is no enlargement of equitable rights by the state statutes, that a bill to quiet title will not lie to dispel mere verbal or oral assertions of ownership or interest, nor may it be maintained if the same record which must be introduced to establish the title claimed, will show there is no title. *Devine* v. *Los Angeles*, 202 U. S. 313, 332, 26 S. Ct. 652, 50 L. Ed. 1046, citing *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *Louisville & N. R. Co.* v. *W. U. Tel. Co.*, *supra*; *Parker* v. *Shannon*, 121 Ill. 452, 454, 13 N. E. 155; *First Congregational Church* v. *Page*, 257 Ill. 472, 100 N. E. 975.

In opposition to the statements of the Supreme Courts of both the United States and Illinois as to the requirements under the general usages of equity for relief under bills *quia timet*, plaintiff invokes *Rector, etc.*, v. *Rector, etc.*, 201 N. Y. 1, 94 N. E. 191. There the court sustained an action to cancel and remove a cloud upon the title to the plaintiff's premises in the nature of a covenant restricting the use of premises to church purposes. There was a state statute which authorized the maintenance of an action to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records the defendant might make, to an estate or interest in real property. The court sustained the bill under both the general powers of a court of equity and the state statute. With reference to the general usages of equity the court said:

"The power of a court of equity may be difficult to define. It is coextensive with the rights of persons to relief. Pomeroy, in his Equity Jurisprudence (volume 1, § 170), says: 'It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are prac-

tically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations.' As applied to titles to real estate, and removing obstacles therefrom, it is the ordinary jurisdiction of a court of equity to perfect and complete the means by which the title, right, estate or interest of parties may be proved or secured, or to remove obstacles which hinder its enjoyment. *Sharon* v. *Tucker*, 144 U. S. 533 [12 S. Ct. 720, 36 L. Ed. 532]."

The opinion in which it was stated that the action could be maintained under general equitable rules as one to remove a cloud upon title, as well as under the state statute, was concurred in by three justices only. In the dissenting opinion, likewise concurred in by three judges, it was said:

"As an appeal to the equity powers of the court, it is necessary that the case shall fall under some recognized head of equity jurisdiction. I know of no branch of that jurisdiction which would comprehend such an action as this. It is asserted, however, that the power of a court of equity 'is coextensive with the rights of persons to relief,' and that the provisions of our code are broad enough for the case. The first assertion is true, only, in a case of equitable cognizance. When a person brings an equitable action, he must maintain it upon some equitable ground. However elastic and discretionary the exercise of the power to grant equitable relief, I do not believe that it can be properly invoked by a party to cancel a covenant in his grant. I am not aware of any precedent and we are cited to none. Though in matters of apparent equity, as fraud or breach of trust, precedents are not necessary, it is dangerous to extend the authority of the court further than the practice of former times. * * * There is no charge of any fraudulent practices or of mistake. * * * The plaintiff is seeking affirmatively to annul, as a cloud upon its title, an agreement which entered into the consideration for the conveyance upon the ground that it was invalid, because unenforceable. If the invalidity of the covenant can be established by extrinsic evidence, then the plaintiff can defeat any action brought to enforce it. Can it be true that it is a cloud upon the title? There is no adverse claim to the property and, whether the restrictive covenant be valid or invalid, * * * how can it create a cloud upon title? If invalid, the defect would, necessarily, appear in any

proceeding by the defendant to enforce it. I do not think that the fact that a defense exists to its enforcement is sufficient to warrant a resort to an equitable action."

The case was decided by the vote of the Chief Justice, who merely concurred in the result, without indicating whether he regarded the general equity powers of the court or the state statute as the proper basis for the action.

The principles stated in *Sharon* v. *Tucker, supra,* do not warrant any such extension of the powers of a court of equity with reference to bills to remove clouds upon title as is set forth in the opinion of the court in *Rector, etc.,* v. *Rector, etc., supra.* The opinion in the former case was by Mr. Justice Field, who wrote the opinion in *Holland* v. *Challen, supra.* In *Holland* v. *Challen* the requirements of bills of the peace and bills to remove clouds upon title are stated, and the limitations are the ones which have been set forth above. In *Sharon* v. *Tucker* it is pointed out that the bill in that case could not be maintained, either as a bill of peace or a bill to remove a cloud. The ground of equitable jurisdiction was the protection of a title not evidenced by any record, but resting in the recollection of witnesses and the warrant for its exercise was found in the ordinary jurisdiction of equity to perfect and complete the means by which the right, interest, or estate of holders of real property—that is, their title—may be proved and secured, or to remove obstacles to its enjoyment. The plaintiffs claimed title by adverse possession. There was no record of their title, and its establishment was dependent upon the recollection of witnesses. The object of the suit was to provide record evidence of the title. The court said:

"The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record."

It was with reference to such a case that the Supreme Court of the United States made the general observation that flexibility of decrees of a court of equity will enable it to meet every emergency. But, of course, the statement was made with reference to cases of equitable cognizance. An equitable action, however broad

and elastic the relief may be, must be maintained upon some equitable ground. And in *Sharon* v. *Tucker* the equitable ground was stated to be one entirely different from that on which bills to remove clouds on title are maintained. The bill in *Sharon* v. *Tucker* was sustained on the same principle as that on which the existence of lost deeds is established in equity. There is nothing in the case which even remotely warrants a modification of the requirements of bills to remove clouds on title as they have been laid down in *Holland* v. *Challen, supra, Devine* v. *Los Angeles, supra,* and other decisions of the Supreme Court. There is nothing in the case which sustains the right to maintain in equity a bill to remove a cloud on title, where the alleged cloud arises from a covenant in the grant by which the plaintiff obtains his interest or estate in the property. An examination of the cases demonstrates that the usages of equity concerning bills to quiet title, as recognized in the federal courts, are correctly stated in the dissenting opinion of Justice Gray in *Rector, etc.,* v. *Rector, etc., supra,* in which three judges concurred, rather than in the opinion of the court, in which three judges only concurred.

The plaintiff, in my opinion, has failed to make out a case under the general usages of equity as to bills to remove clouds on title. The alleged cloud arises out of verbal or oral claims of the lessors concerning the construction of the lease under which plaintiff derives its right to the possession of the premises. If the lease is clearly to be construed as plaintiff claims it should be, then the invalidity of the contentions of the defendants appears from the document which plaintiff introduces to establish its title. If the construction of the lease is doubtful, then the claim of defendants is more than a cloud, and they are entitled to have it tried by an action at law. *Phelps* v. *Harris,* 101 U. S. 370, 375, 25 L. Ed. 855.

Plaintiff's case as a suit to quiet title under the general usages of equity reduces itself to this: Whenever a controversy arises between landlord and tenant as to the construction of the provisions of the lease touching the use of the demised premises, the tenant may resort to a court of equity, and, in the guise of a suit to remove a cloud on title, obtain a construction of the lease which will be binding upon the landlord when he attempts to enforce by legal remedies the provisions of the contract.

Such an action is contrary to the usages of equity and contravenes the fundamental distinction between law and equity.

Having viewed plaintiff's case in the light of the general usages of equity controlling the federal courts, and as if there were no local statute or local law with reference to what constitutes a cloud on title, let us inquire whether or not there is any enlargement of equitable right under the local law which will be here administered. While it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights themselves may be administered by the federal courts as well as by the courts of the state. It is proper to look to the legislation of the state in which the court sits to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have the power to remove.

There are many state statutes of this kind, and it has been said that "an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding." *Holland* v. *Challen, supra.* Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of the parties. *Broderick's Will Case,* 21 Wall. 520, 22 L. Ed. 599. The decisions show that the enforcement of statutes of this type in the federal courts are subject to three restrictions: (1) The case must be within the general class over which these courts are given jurisdiction; (2) a suit in equity does not lie where there is a plain, adequate, and complete remedy at law; (3) in those courts there can be no commingling of legal and equitable remedies, or substitution of the latter, whereby the constitutional right of trial by jury in actions at law is defeated. *Louisville & N. R. Co.* v. *Western Union Tel. Co.,* 234 U. S. 369, 376, 34 S. Ct. 810, 58 L. Ed. 1356, and cases there cited

It is provided by the Chancery Act of Illinois (1 J. & A. Stat. p. 785) that the court may hear and determine bills to quiet title, and to remove clouds from the title to real estate, and bills to establish and confirm titles to real estate or incumbrance thereon, whether the lands

in controversy are improved or occupied or unimproved or unoccupied. The clause, "and bills to establish and confirm titles to real estate or incumbrance thereon," was introduced by an amendment of June 5, 1911. Sess. Laws 1911, p. 253. The power of courts of equity to remove clouds upon title to real estate under the Illinois statute is substantially no broader, under the Illinois statute prior to the amendment of 1911, than it is under the general usages of courts of equity. There are some provisions as to possession and occupation which are not material here. A bill will not lie to remove a mere verbal assertion of ownership in property as a cloud upon title. A cloud upon title is a claim, apparently valid, which may be removed by extrinsic evidence, and equity will not take jurisdiction to remove a cloud on a title, where there is no defect in the title, except what is apparent on the face of the instrument under which the title is derived. *Greenough* v. *Greenough*, 284 Ill. 416, 120 N. E. 272; *First Congregational Church* v. *Page*, 257 Ill. 472, 100 N. E. 975; *Parker* v. *Shannon*, 121 Ill. 452, 13 N. E. 155. "It would be a rather anomalous situation," said the court in *First Congregational Church* v. *Page, supra*, "to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims title."

As to the amendment of 1911, the power conferred upon courts of equity is the power to establish and confirm titles to real estate. While a lease for a long term of years is treated under certain statutes and for certain purposes as real estate, it is essentially a chattel real. A lease, although for a long term, with payments of annual rent, is not a sale, which is a grant of absolute ownership. *Chicago* v. *Tribune Co.*, 248 Ill. 242, 93 N. E. 757; *People* v. *Shedd, supra*. It would be an unwarranted application of this provision to extend it to controversies between a landlord and tenant relative to the construction of the lease. When it is read in its relation to the statute of which it is a part, it is apparent that it cannot have such an application.

Moreover, before this provision will be administered in the Federal Courts, the case which is based upon it must be one over which those courts have jurisdiction. The court will not entertain a case merely for the purpose of establishing a rule for controlling predicted future conduct. Resort to a court of equity must be predicated

upon some equitable ground. A bill to establish and confirm title, if it is to be maintained in this court, must be grounded upon some principle upon which courts of equity grant relief, as was the case in *Sharon* v. *Tucker*, *supra*. Property owners may not rush to a court of equity merely to have it do the work which is ordinarily performed by those who give opinions as to title or who guarantee those titles. The state statutes, as they must be administered here, do not enlarge the equitable rights of plaintiff, so as to permit it to maintain this action, which is not cognizable, as a bill to remove a cloud upon title, under the general usages of courts of equity.

While the bill has been presented as one to remove a cloud from title, it is proper to inquire whether, upon the facts alleged and proved, there is any other ground upon which plaintiff's appeal to a court of equity may be sustained. The plaintiff should not be limited by phraseology in pleading, or by the specific form in which the claim for relief is presented.

The bill may not be sustained as one to enjoin a threatened breach of contract. Certainly an assertion by a lessor that he places a construction upon a lease different from the one which the lessee thinks it should receive is not a breach of the implied covenant of quiet enjoyment. A suit to enjoin a breach of a negative covenant in a contract is governed in the main by the same principles as is a suit for specific performance of an affirmative covenant. If the right is doubtful, relief by injunction is improper, and plaintiff's suit here is based upon the alleged doubts arising from the provisions of the lease. No act of defendants has been suggested which amounts even remotely to a threatened breach of the covenant of quiet enjoyment.

The bill may not be sustained as one to enjoin a forfeiture. No forfeiture has been declared. No cause of forfeiture is stated in the bill. No notice of breach of covenant has been given. The six-months period given plaintiff to cure its default has not even begun.

It is urged that this bill must be sustained upon the broad principles of equity jurisdiction, that plaintiff has no adequate remedy at law, and that the power of a court of equity is coextensive with the rights of persons to relief. In other words, plaintiff invokes the principle that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in equity.

It is true that the absense of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity. It is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties. But, while this is true, yet the facts of the case must come within some head of equity jurisprudence. When a person brings an equitable action, he must maintain it upon some equitable ground. The great advantage possessed by a court of equity is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Before the rule as to inadequacy of remedy at law is applied, some wrong must be shown for which the plaintiff is entitled to redress. In other words, there must be a cause of action, whether resort is had to one forum or the other. A court of equity, by avowing that there is a right, but no remedy known to the law, cannot create a right, in violation of the principles of both law and equity. Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity; and what wrong have defendants done by merely asserting that they place upon the contracts in question a construction different from that for which plaintiff contends?

The offer to give bond for the construction of the new building, and the offer to reform the provisions of the leases with reference to purchase of the building at the expiration of the terms, do not aid the plaintiff. Rather they emphasize the fundamental infirmity in its appeal for equitable relief. If plaintiff is right in its construction of the leases, it is entitled to tear down the old building and to put up a new one, without giving bond and without submitting to a modification of the leases. If plaintiff's contention is wrong, a court of equity cannot relieve against the obligations of the contracts, in the absence of some element of fraud, accident, or mistake. Equity does not have power to make contracts for the parties which they have not made for themselves.

The bill will be dismissed, without prejudice to the rights of the plaintiff under the leases here involved, when those rights are asserted in any appropriate proceeding.

APPENDIX II.

Opinion of the Circuit Court of Appeals.

Before Alschuler, Evans and Page, *Circuit Judges.*

Evans, *Cir. J.:* This appeal involves solely a question of equity jurisdiction. The district court dismissed the suit concluding that the alleged facts were insufficient to invoke the jurisdiction of a court of equity. It did not pass upon the existence of facts necessary to sustain the relief sought, providing the court had jurisdiction. In other words, two questions were presented to the district court. One was a question of law—the sufficiency of the allegations of the bill to invoke the court's jurisdiction. The other was one of fact—the sufficiency of the evidence to justify the relief sought. Having ruled adversely to appellant on the first question, the district court made no findings on the second question.

It was agreed in this court,—though the briefs are not so limited,—that we should pass on the first question only; and in case we held for the appellant the cause should be returned to the district court, that the issues of fact might be there tried and determined.

Judge Wilkerson, in his opinion (8 Fed. (2), 998), has so well and fully stated the facts as to meet the approval of both counsel. We adopt the statement thus made.

Speaking in a general way, appellant, at the outset of this argument, is confronted by two contentions which it must meet—either one of which, if sustained, will be fatal to the maintenance of this suit. Both of them were upheld by the district court. They are:

(a) The facts as alleged in the bill are insufficient to invoke the jurisdiction of a court of equity.

(b) The bill seeks nothing but a declaratory decree.

Perhaps the two objections are not so unrelated as might at first appear.

Appellee's position under the first objection may be stated in a quotation from *McElroy* v. *Masterson,* 156 Fed. 42:

> "The bill of complaint should be dismissed, unless it can be maintained that there is a comprehensive discretion reposed by modern equity jurisdic-

tion in the chancellor to make and unmake contracts of parties, *sui juris,* constrained only by no other limitations than those which meet the approval of his conscience. Courts of equity are now as much required as courts of law to enforce contracts free from vitiating elements of fraud, and to refrain from making contracts for the parties on which their minds never met.

In the formative period of equity jurisprudence the English Chancellors, in the absence of established principles and recognized sensible precedents, were much given to the pursuit of their own sense of absolute right and the dictates of their own individual conscience. But in the process of development equity jurisdiction has assumed more the qualities of a composite system of settled rules and principles, by which the property rights of parties are measured and limited, and are rendered more certain and stable".

To use their own language:

"Long settled rules bound the exercise of equity jurisdiction, and, broad though they are, they do not validate invocation of an unlimited fount of remedies for any and all predicaments. Appellant would expand equity into *arbitrium boni viri,* a conception freely translatable as the decision upon the peculiar facts which would be made by a man of intelligence and good character regardless of settled law. If that system of administering justice ever be accepted, every decision becomes a virtual arbitration, all certainty of lawful rights and obligations is prevented, and constitutional limitations upon the powers of courts are swept away.

"Hence the requirement that a plaintiff must predicate his prayer for relief upon some settled principle or head of jurisdiction constituting the department of equity.

"Observance of these rules affords security and stability to vested rights. Disregard means confusion, uncertainty and, in this instance, unlawful taking of property."

Appellant challenges these limitations to equity jurisdiction, and asserts in the language of Pomeroy—Equity Jurisdiction, 4th Edition, Section 62:

"The whole question by which the extent of the

equity jurisdiction is practically determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate—although the latter inquiry is still sometimes made and treated as though it were controlling,—the question is, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity. * * * A court of equity will not, *unless perhaps in some very exceptional case,* assume jurisdiction over a controversy, the facts of which do not bring it within some general principle or acknowledged head of equitable jurisprudence."

To this statement counsel add their own views of the present litigation:

"While we think there should be no necessity of so doing, we expect to show that if the bill in this case discloses meritorious grounds for equitable relief, there is nothing to prevent the Court, should it prefer that alternative, from accrediting the bill with a conventional name. It may be convenient for ordinary purposes of reservation to have at hand a cabinet of standard labels, but our position is that no such catalogue can deprive equity of its fundamental and most valuable attraction of administering relief according to the exigencies of each case as it arises."

While the opposing counsel thus approach the controversy at issue from different angles, they do not differ widely when they reach the narrow issue here involved.

While it may be, and in most instances is entirely satisfactory and practical to predicate jurisdiction upon our ability to bring the facts within some recognized head of equity jurisdiction, we cannot believe that the doors opening to the courts of equity are numbered, or labeled, or limited. The origin and growth and entire history of equity jurisdiction repels the conclusion that it has ceased to grow, or that only those cases may be recognized which fall within the heretofore existing heads or branches of equity.

Perhaps these foregoing abstract statements have been pursued too far, for, after all it is asserted by appellant's counsel that its cause falls under one of the recognized heads of equity,—namely a bill to remove a

cloud on title. In fact it may be that the so-called enlargement of equity jurisdiction applies more to the rules governing these recognized heads of equity jurisdiction, and to the remedies and the relief obtainable thereunder, than to the general subject of equity jurisdiction.

Further concessions on the part of appellant, that the equity jurisdiction of the district court, from which this appeal is taken, has not been enlarged by any statute of the state of Illinois; that its bill is not a bill of peace, or a bill to relieve from a declared forfeiture, or a bill *quia timet,* or one to enjoin a breach of contract, narrow the issue. In other words, it asserts that while "its right to relief" is "one of substance and not of form", yet if "an old label" must be applied "it is a bill to remove a cloud on title". It asserts that its bill alleges the existence of the three necessary facts which, when present, invoke the jurisdiction of a court of equity: (1) the existence of a substantial property right; (2) present or imminent deprivation of the beneficial use and enjoyment of that right; (3) lack of adequate legal remedy to protect the owner of such right in the use and enjoyment thereof.

Citations of authorities are hardly necessary to sustain the proposition that in a proper case equity will relieve a holder of real estate from the injury or damages which arise from the presence of a hostile or adverse claim. *Holland* v. *Challen,* 110 U. S. 15; *McArthur* v. *Hood Rubber Co.,* 221 Mass. 372.

The objections to the bill as one to remove a cloud on title may be considered under the following four heads:

(a) Appellant's title under the Illinois decisions was not a legal title and, therefore, not susceptible of being clouded.

(b) No hostile or adverse claim is asserted by any appellee, and, therefore, no cloud exists.

(c) Whatever adverse claim or cloud is alleged to exist grew out of the very instrument which constitutes the basis of appellant's title, and being in the same instrument, it is not a cloud of title removable in equity.

(d) If doubt respecting appellant's title exists by virtue of certain provisions of the lease, then appellees' claim is more than a cloud, and the parties must resort to an action at law to determine the same.

(a) Appellant's interest in the real estate involved consists of several leases, some for 198 years and others

for 99 years. Appellees insist that under the Illinois law these leases are chattels (*Chicago* v. *Tribune Company,* 248 Ill. 242; *Thornton* v. *Mehring,* 117 Ill. 55) and do not convey an interest in land. From this fact they argue that equity will not grant relief to a mere holder of a chattel, a lessee for a term of years.

There are two answers to this contention. The first one assumes that appellant's leases are mere chattels, the other assumes they are chattels real, as defined by Judge Wilkerson.

Assuming the leases to be chattels, we adopt the rule announced in many well considered cases and contended for by Pomeroy (Pomeroy's Equitable Remedies, 2nd Ed., section 2151) and hold that equity will take jurisdiction to relieve against a cloud even though the subject matter be personal, rather than real, property.

Suits to remove cloud on title where the property is personal have been repeatedly sustained. *Magnuson* v. *Clithero,* 101 Wis. 551; *Voxx* v. *Murray,* 50 Ohio State 19; *Sherman* v. *Fitch,* 98 Mass. 59; *Martin* v. *Maxwell,* 86 S. C. 1; Pomeroy's Equitable Remedies, Section 369; *Thompson* v. *Emmet Irrigation District,* 227 Fed. 560; *Rosenbaum* v. *Foss,* 4 S. D. 184, 56 N. W. 114; *N. Y. & N. H. Railroad* v. *Schuyler,* 17 N. Y. 592; *Stebbins* v. *Perry County,* 167 Illinois 567.

Precedents rather than logic sustain the distinctions made between real and personal property as the subject matter of suits to remove clouds on title.

This conclusion is, of course, fortified by the fact that the lease under consideration is, after all, a chattel real. It conveys an interest in land, *People* v. *Shedd,* 241 Ill. 155, though for some purposes it may be described as a chattel.

We conclude that appellant's leases form such a substantial property right as entitled it to admittance into a court of equity and to relief therefrom other necessary facts being present. *Johnson* v. *Samuelson,* 82 Neb. 201, 130 A. S. R. 666; *German-American Savings Bank* v. *Gollmer,* (Cal.) 24 L. R. A. (N. S.) 1066.

More serious are the objections (b) and (c) which will be considered together.

It is admitted that the cloud on appellant's title, if any exists, arose out of the same instrument that created appellant's title. That such fact alone robs equity of its jurisdiction, appellant denies.

Decisions are cited which support appellees' contention. We are at a loss, however, to understand why such a rule should prevail. Why must the cloud appear in an instrument other than the one upon which appellant relies for its title? The basis of equity jurisdiction, the reasons which originally, and have since, induced courts of equity to act to remove clouds on title are in no way connected with, or predicated upon the separate and isolated character of the written document that creates the cloud. It may be admitted that removable clouds most frequently appear in instruments other than the one through which complainants trace their title. In fact it no doubt frequently occurs that if a single instrument creates the plaintiff's right and also the so-called cloud, the assertion of the latter *necessarily* casts such doubt upon appellant's title as to require a denial of the relief sought. Particularly is this true where the cloud is found in the granting clause of appellant's title. This was apparently the situation in *First Congregational Church* v. *Page*, 257 Ill. 472, for the court said:

> "It would be a rather anomalous situation to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims."

We are not satisfied that the existence of a common instrument creating appellant's title and appellees' cloud calls for a refusal of a court of equity to act. Rather should the question be determined by an examination of the document to ascertain whether the so-called cloud is one which a court of equity should remove, and also whether the so-called cloud impairs appellant's title or rights, or casts such doubt upon it as to require a denial of the relief sought.

Examining the appellant's muniment of title, its leases, we find that it has an unqualified grant for 99 years, (in most part 198 years), of a right to occupy the land described. In other words, it is given a lease of land located in the heart of Chicago, which property is of large value, and in consideration thereof it is required to pay a large sum of money as rental. The mere grant of the right to occupy the land for a large cash rental gives rise to the inference that the occupants were to use the land rather than to permit it to lie idle. The use of such property in a city like Chicago, and at the date this lease was executed, (the real estate being in the

business district), leaves no room for doubt that such property thus leased was to be used as the foundation for a building, for the use of which rentals were to be collected. While this would be the unavoidable deduction to be made from the execution of the lease, other provisions of the lease conclusively establish the correctness of this deduction.

In the absence of any provision in the lease itself, it is likewise hardly conceivable that a lease for 198 years, or even one for 99 years, should be so construed as to deny to the lessee the right to rebuild as changing conditions require.

It may be conceded that modern structures are more or less permanent. They are more so now than in 1887 when the leases were executed. But the changes in the building art in the last forty years, of which the court can and will take judicial notice, justify the conclusion that permanency in buildings is but a relative term, and particularly so in a city like Chicago.

In short, appellant shows it possessed valuable rights; that their existence was neither doubtful nor uncertain; that the enjoyment of these rights was possible only through the use of the rented ground as the site for a building; that the location of the property, its large value, the size of the rentals, and the taxes conclusively negative the possibility of the lease being executed save for commercial purposes. And it then follows, as an unavoidable deduction from the grant for a lease for 198 years, that the building or buildings which were to be constructed thereon should, from time to time, be repaired, and at *some time* during the existence of the lease be *replaced* by new buildings.

Appellant alleges that it is unable to rebuild because of the cloud on its title occasioned by certain provisions in the lease, and the appellees' position in respect to such provisions. It seems to us that appellant, in making these allegations, has gone far toward establishing its right to have a court of equity hear the evidence.

Appellees insist that there is no cloud on appellant's title; that no verbal position taken by any of them can create a cloud removable in a suit of this character. It further contends that if this position is not sound, then the so-called cloud is not such a one as the law contemplates, but instead throws such doubt on appellant's claim as defeats its right to bring this suit.

First let us consider the nature of the alleged cloud and then determine whether it comes within the legal definition of a cloud on title.

Bearing in mind that the enjoyment of this lease is dependent upon appellant's right to build a structure of suitable size and character to meet the needs of the community, it is apparent that appellant must finance the cost of such a building. To do so, it must have an unhampered entrance into the money market. To raise fifteen or twenty millions of dollars, the builder's title must not only be free from doubt but free from the suspicion of doubt. A cloud on title is a relative term. What may be passed as merchantable under certain conditions would be rejected under different circumstances.

But no examiner of title could, or would, have the temerity to urge that a provision against building, or a provision which an adverse party insists is against rebuilding, casts no cloud on the title of a 198 year leasehold. And too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile assertion by an adverse claimant, be the basis of a cloud on title.

What then are the requirements of an adverse claim that will make it a cloud on title, as that term is used in courts of equity in suits of this character? What is the cloud of which appellant complains?

Upon the first question the decisions may be divided into the strict and the liberal holdings. From the latter, which we are inclined to follow, we conclude that a hostile or adverse claim becomes a removable cloud if it impairs the merchantability of appellant's title, materially affects the marketability of appellant's property, or defeats or impairs the legitimate use and enjoyment of appellant's property, which includes its right to construct a suitable building thereon, so that the maximum rental may be secured. The following are a few of the many decisions available. *McArthur* v. *Rubber Co.* (Mass.) 109 N. E. 162; *Witt* v. *Sims* (Ga.) 78 S. E. 467; *Johnson* v. *County* (Mont.) 146 P. 471; *Hawes* v. *Clarke*, 144 N. Y. S. 11; *Deckenbach* v. *Deckenbach* (Ore.) 130 P. 729; *Campbell* v. *Disney* (Ky.) 18 S. W. 1027; *Kittle* v. *Bellegarde* (Cal.) 25 Pac. 55; *Palmer* v. *Yorks*, (Minn.) 79 N. W. 587; *Pacific Coast Pipe Co.* v. *Hedican* (Wash.) 112 Pac. 655; *Bird Timber Co.* v. *Snohomish County*

(Wash.) 152 Pac. 689; *Fox* v. *Williams* (Wis.) 66 N. W. 357; *Broderick* v. *Cary* (Wis.) 74 N. W. 95.

In *McArthur* v. *Hood Rubber Co., supra,* the court says,

> "Whenever a deed or other instrument exists which may be used to vex or injure the owner, or which may cast a suspicion upon his title or interest and he cannot immediately protect or maintain his right fully and completely by proceedings at law, then a court of equity will afford relief by a decree of such scope as justice may require to adjust the rights of the parties."

It is true that many of these decisions (though not the Massachusetts case) are under statutes that are broad and inclusive in their language. Doubtless these statutes have had a large influence in determining the character of a hostile claim removable as a cloud on title. But whether the causes be traced to these statutes, or, as in the Massachusetts case, to the necessities of society, courts have given to an adverse or hostile claim a definition far more inclusive than the one which obtained several decades ago.

Appellant also alleges that appellees take the position that the clauses deny to the appellant the right to replace the present building with a new and modern structure. It is not contending that appellee's verbally stated position alone constitutes a cloud. It is appellees' position respecting the lease, this written document of record, (which position is manifested by oral pronouncement, and by their refusal to consent to the rebuilding) *in addition to the clauses,* that creates the infirmity in appellant's asserted right and defeats, or at least impairs, its enjoyment of its lease.

It seems to us that this constitutes a removable cloud on title.

Plaintiff's right must be clear. But the certainty of such right must be determined in the first instance by the allegations of the bill, (unless they charge conclusions or facts from which different conclusions are unavoidable), and not by the facts which ultimately may develop when the Chancellor hears the evidence. There is nothing illogical or fatally weak in appellant's allegations that this clause, together with appellees' stand under it, impairs its ability to finance the undertaking, without which it cannot rebuild.

may tear down your building, in which case an action at law will be brought against you, and if your contentions are not upheld, you will be ousted, and all you have invested will be lost? True, this court cannot make contracts for the parties. It cannot remake leases for competent parties who have contracted. But it can, and does, say that plaintiff's remedy at law is not adequate when it must stake its entire investment, risk loss of its leasehold perhaps, as a condition upon which it may judicially ascertain its legal rights.

In determining whether appellant has an adequate remedy at law, it is important to bear in mind the word "adequate."

Complainant may have redress at law but such remedy may nevertheless be inadequate. 10 R. C. L. 275; *Haines* v. *Trueblood et al.* (Ind.) 119 N. E. 382; *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282-285, 286.

It has been held that a remedy at law is inadequate unless it be in the control of the party seeking relief. Delay alone may furnish sufficient justification for a successful appeal to equity, and delay is unavoidable and its duration uncertain where a resort to legal redress is dependent on the action of an adversary. *Fredenberg* v. *Whitney*, 240 Fed. 823; *Bank of Kentucky* v. *Stone*, 88 Fed. 383.

The rule is stated in *Fredenberg* v. *Whitney* thus:

> "In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment. When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, that doubt should be resolved in favor of the petitioners."

In the present suit, it is true, appellant may provoke appellees to action. It may so act as to give each of them a right to institute an action in law. But such a course will occasion vexatious and unavoidable delays due to the number of actions that must be instituted and tried.

Throughout this opinion we have endeavored to avoid its undue prolongation by an analysis of the numerous decisions cited which bear upon the legal questions in-

volved. The decisions are without number that deal with the question of equity jurisdiction. It would be a hopeless task to attempt to analyze each one or even to satisfactorily reconcile them. Two cases, however, deserve special attention for, if it be necessary to fortify or sustain our conclusions by judicial precedents, then these decisions merit citation. The two cases are *Rector* v. *Rector,* (N. Y.) 94 N. E. 191 and *McArthur* v. *Hood Rubber Co.* (Mass.), 109 N. E. 162.

Both cases are authority for the conclusion here reached that a removable cloud on title may arise in the instrument through which plaintiff traces its title. They also support the position that a negative covenant may constitute a removable cloud on title. Both opinions are vigorously assailed. The Rector decision, it is argued, was by a divided court; and it is contended that the McArthur case was later overruled by the same court.

The attack on the Rector decision because it was rendered by a divided court needs no answer except to observe that we are interested in the soundness of the principle announced rather than in an academic discussion of the weight accordable to opinions of the majority of divided courts.

We appreciate that this decision may well be called an advanced one. ("A novel one" 2 Harvard Law Review 543.) Its persuasiveness, however, lies not in its isolation or in its uniqueness, but in its appeal to conscience.

We do not agree that the decision in the McArthur case was overruled by the *Riverbank Improvement Co.* v. *Chadwick* (Mass.) 117 N. E. 244. The issues were different in the two cases.

In this opinion we have refrained from stating appellees' fact position regarding this clause in the lease. We have done so for the reason that we are not concerned with the controverted facts bearing on this issue. We want the district court to know that we have not in any way intimated our views respecting these facts, or the persuasiveness of the facts on either side. Our sole question is to determine whether a court of equity should take jurisdiction of the suit. The trial court must determine whether the facts justify the relief sought. And its approach to this question should be uninfluenced by anything we may have said on the legal question here under consideration.

MORTGAGEES.

The trust company representing the bondholders has a lien in the building and it has joined the fee owners in objecting to the court's jurisdiction.

There is no controversy as to the existence of such mortgage, and the legal question it presents can not be ignored. Mortgagee asserts its position to be one with vested rights that cannot be disturbed without its consent. But in what is the mortgagee interested? Wherein is it prejudiced? It is interested in its lien—nothing more. Its lien covers the leasehold to the extent of about $1,250,000.00. The building in question adds to its security, hence, its interest. But it is in the security, nothing more, that it is interested.

While it is hard to see how its security may be impaired, yet, relying on the letter of its bond, it asserts that the security may not be changed without its consent.

But, if appellant's position is correct, the mortgagee took its bonds subject to appellant's right to replace the present structure with a new one. If the right to rebuild is an implied right rising from the grant of a 198 year lease, wherein has a mortgagee any legitimate complaint if the mortgagor does rebuild, and as here, offers to deposit a bond or cash to protect the mortgagee.

Appellant's right to maintain the suit is predicated upon its implied right to rebuild, which arises from the grant of a 198 year lease. Such right, if it exists at all, appeared in the recorded title of the mortgagor when the mortgage in question was executed. Mortgagee cannot now complain of the exercise of a right of which it had notice. Particularly is this so where, as here, the mortgagee offers cash or bond security in twice the amount of the mortgage during the period of construction, or until such time as the court fixes.

If the trial court, upon trial of the issue of fact, ultimately determines that appellant has no right to replace the Auditorium building with a new structure, then, of course, the mortgagee's objection to its so doing will be sustained.

This brings us to the second objection advanced by appellees.

Does appellant ask merely for a declaratory decree construing its lease and establishing its rights thereunder?

Many cases have been cited (*Muskrat* v. *United States*, 219 U. S. 346; *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466; *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308) and many others might be added, holding that a court is empowered to hear only actual controversies. They cannot pronounce declaratory decrees which decide abstract propositions for the future guidance of parties interested. But if the instant suit is properly cognizable in a court of equity,—one to remove a cloud on title,—and we hold that it is,—it may be maintained and is distinguishable from the above cited decisions upon which appellees rely.

We cannot close this opinion without expressing our appreciation of the particularly able and helpful briefs which counsel for both sides have submitted.

The decree is reversed with direction to the district court to hear the evidence and determine the issues involved.